Office Supreme Court, U.S.
FILED
MAR 30 1964
JOHN F. DAVIS, CLERK

No. 958

In the

Supreme Court of the United States

OCTOBER TERM, 1963

PAUL REVERE LIFE INSURANCE COMPANY,
Petitioner,

v.

FIRST NATIONAL BANK IN DALLAS, ADMINISTRATOR OF THE ESTATE OF LOY THOMAS BROWN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

WILLIAM D. NEARY,
2300 Republic National Bank Building,
Dallas 1, Texas,
Attorney for Petitioner.

Of Counsel:

PINKNEY GRISSOM,
JERRY L. BUCHMEYER,
THOMPSON, KNIGHT, WRIGHT & SIMMONS,
All of Dallas, Texas.

ORVILLE F. GRAHAME,
Worcester, Massachusetts.

WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

SUBJECT INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes and constitutional provision involved	2
Statement	2
Reasons for granting the writ	5
1. Direct conflict with decision of this Court in *Meredith v. Winter Haven*	5
2. Direct conflict with recent decisions of other Courts of Appeals	7
3. Decision below raises critical questions regarding federal jurisdiction, practice and procedure which are of fundamental importance far beyond the particular parties and facts involved	8
4. Subsidiary questions	19
Prayer	20
Proof of Service	1
Appendix A—Statutes, constitutional provision	1A
Appendix B—Opinion below	1B-15B
Judgment below	16B
Appendix C—Unreported conflicting opinion	1C-5C

Page

Cases:

Akin v. Louisiana National Bank, 322 F. 2d 749 (5th Cir. 1963) 7

Clay v. Sun Ins. Office, 363 U.S. 207, 4 L.Ed. 2d 1170, 80 S.Ct. 1222 (1960) 12, 16

Continental Casualty Co. v. Warren, 152 Tex. 164, 254 S.W. 2d 762 (1953) 3-4, 14

County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 3 L.Ed. 2d 1163, 79 S.Ct. 1060 (1959) 6, 9, 18

Elliott v. Joseph, 163 Tex. 71, 351 S.W. 2d 879 (1961) 15

England v. Louisiana State Board of Medical Examiners, U.S. , 11 L.Ed. 2d 440, 84 S.Ct. (Jan. 13, 1964) 12-15, 17, 19

Estate of Spiegel v. Commissioner, 335 U.S. 701, 93 L.Ed. 330, 69 S.Ct. 301 (1949) 7

Ford Motor Co. v. Mathis, 322 F. 2d 267 (5th Cir. 1963) 7

Keidan v. Universal C.I.T. Credit Corp., F. 2d (6th Cir. Feb. 13, 1964) (Appendix C, *infra*) 7

Leiter Minerals, Inc. v. California Co., 241 La. 915, 132 So. 2d 845 (1961) 15

Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 3 L.Ed. 2d 1058, 79 S.Ct. 1070 (1959) *passim* from 8

Mach-Tronics, Inc. v. Zirpoli, 316 F. 2d 820 (9th Cir. 1963) 8

Meredith v. Winter Haven, 320 U.S. 228, 88 L.Ed. 9, 64 S.Ct. 7 (1943) *passim* from 5

Merritt-Chapman & Scott Corp. v. Frazier, 289 F. 2d 849 (9th Cir. 1961), cert. denied, 368 U.S. 835 (1961) 7

Morrow v. Corbin, 122 Tex. 553, 62 S.W. 2d 641 (1933) 5

Page

McNeese v. Board of Education, 373 U.S. 668, 10 L.Ed. 2d 622, 83 S.Ct. 1433 (1963) 3

NAACP v. Gallion, 368 U.S. 16, 7 L.Ed. 2d 85, 82 S.Ct. 4 (1961) 13

Propper v. Clark, 337 U.S. 472, 93 L.Ed. 1480, 69 S.Ct. 1333 (1949). 7, 17

United Services Life Ins. Co. v. Delaney, 308 F. 2d 484 (5th Cir. 1962) (opinion withdrawn) 4, 19

Treatises:

1 Barron & Holtzoff, Federal Prac. and Proc. §64, pp. 348-50 (1960) 8

1A Moore, Fed. Prac. §0.203[3], pp. 2119-21 (1959) 8

Periodicals:

Cardozo, Choosing and Declaring State Law: Deference to State Courts Versus Federal Responsibility, 55 Nw.L.Rev. 419 (1960) 17

Kaplan, Certification of Questions from Federal Appellate Courts to the Florida Supreme Court and its Impact on the Abstention Doctrine, 16 Miami L. Rev. 413 (1962) 8, 16

Kurland, Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine, 24 F.R.D. 481 (1960) 10

Note, Abstention by Federal Court from the Exercise of Jurisdiction in Diversity Case, 13 Vand. L. Rev. 801 (1960) 8

Note, Federal Proceedings Postponed Until State Court Determines Uncertain State Law, 40 Texas L. Rev. 1041 (1962) 15-16

Note, Inter-Jurisdictional Certification: Beyond Abstention Toward Co-operative Judicial Federalism, 111 U.Pa. L.Rev. 344 (1963) 14

Page

Note, Judicial Abstention from the Exercise of Federal Jurisdiction, 59 Col. L.Rev. 749 (1959) 8, 12, 14, 17

Note, Louisiana Power & Light v. Thibodaux: The Abstention Doctrine Expanded, 69 Yale L.J. 643 (1960) 8, 12, 14, 16, 19

Wright, The Abstention Doctrine Reconsidered, 37 Texas L.Rev. 813 (1959) 7, 10, 12, 14, 19

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1963

PAUL REVERE LIFE INSURANCE COMPANY,
Petitioner,

v.

FIRST NATIONAL BANK IN DALLAS, ADMINISTRATOR OF THE ESTATE OF LOY THOMAS BROWN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Paul Revere Life Insurance Company, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on February 4, 1964.

Opinion Below

The opinion of the Court of Appeals is not yet officially reported; it is printed in Appendix B, *infra*, pp. 1B-15B.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on the same day as the opinion, February 4, 1964

(R. 68; Appendix B, p. 16B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Question Presented

Whether the Court of Appeals, on appeal from a judgment on the merits by the district court, rightly "abstained" from deciding a diversity case between private litigants on the ground that the controlling state common law is confused and difficult of determination.

Statutes and Constitutional Provisions Involved

This case involves the statutory and constitutional provisions regarding diversity jurisdiction of federal courts, to wit: 28 U.S.C. § § 1332(a) (1), 1441(a) and U.S. Const. art. III, § 2, cl. 1; these are set out verbatim in Appendix A, *infra*, p. 1A.

Statement

This action was originally filed by Respondent on September 27, 1961 in the state district court of Dallas County, Texas, but was duly removed by Petitioner to the United States District Court for the Northern District of Texas on the basis of diversity of citizenship, the Respondent being a citizen of Texas and the Petitioner being a citizen of Massachusetts (R. 1-2).

The facts of the case were undisputed (R. 12-14, 34, 35); the sole issue presented for judicial determination was this question of law: whether the death of Loy Thomas Brown—which occurred while he was *piloting*, operating and in con-

trol of a private plane which crashed—was within the coverage of two insurance policies issued to him by Petitioner, Paul Revere Life Insurance Company (R. 17-19), each of which policies (insofar as is here material) contained this specific exclusion clause:

> "* * * This policy also does not cover death or disability resulting from flight in aircraft except as a *passenger* on a civilian plane * * *" (Emphasis added) (R. 22, 27).

On February 9, 1962, the federal district court held by written opinion (R. 36) that it was constrained—by the Texas decision of *Continental Casualty Co. v. Warren*, 152 Tex. 164, 254 S.W. 2d 762 (1953)—to find that the word "passenger" in the excepted risk provision quoted above means all "occupants" of the plane, including those persons piloting and operating the plane (such as the insured, Loy Thomas Brown); summary judgment was thus rendered against Petitioner for $13,320, the face amount of the two policies plus statutory penalties, interest and attorneys' fees (R. 41).

Appeal was duly perfected from this judgment to the United States Court of Appeals for the Fifth Circuit; but, before oral argument and submission could be held, decision was rendered by a Fifth Circuit panel in an extremely similar "pilot-passenger" diversity case which had originated in the Western District of Texas—"United Services Life Insurance Company v. Joan Flores Delaney, Cause No. 19531". This panel, with a strong dissent by Judge Wisdom, held that "it was impelled . . . by the pronouncements of the Texas Courts" in *Continental Casualty Co. v. Warren, supra*, to

hold that "under the governing law of Texas, the word 'passenger' in the limiting clause of the policy had the same meaning as 'occupant', and did not exclude the pilot." (Appendix B, pp. 2B-3B).

This opinion by the *United Services* panel would, normally, have been dispositive of the single issue involved in the appeal by Petitioner ("Paul Revere") from the judgment rendered against it by the district court. However, because of the apprehension of the different panel of judges hearing the appeal by Petitioner that the earlier decision of the *United Services* panel was at least doubtful enough to warrant a review by the full Court (Appendix B, p. 14B), the *Paul Revere* case was submitted to the Fifth Circuit en banc on February 14, 1963 (R. 52). Then, the reconsideration by the entire Court of Appeals of the "meaning, effect and applicability of the *Warren* cases resulted in a grave doubt as to whether its rationale had been correctly determined in the *United Services* case," and that case was also referred to the court en banc in order to avoid a conflict in decisions (Appendix B, p. 3B).

However, no decision on the merits was forthcoming, for on February 4, 1964, by a five-four decision, the Court of Appeals "abstained", *sua sponte*, from deciding the single issue involved in this diversity case between private litigants—the "meaning, effect and applicability" of *Continental Casualty Co. v. Warren*, *supra* — on the sole

[1] This opinion is reported in 308 F.2d 484 (5th Cir. 1962); the decision of the district court in the *United Services* case, which was nominally affirmed until the withdrawal of the Fifth Circuit's opinion, is reported in 201 F.Supp. 25 (W.D. Tex. 1961).

ground that the controlling state law was too difficult of determination. Relying upon the "increasing recognition" by this Court of "the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of law," the Court of Appeals stayed the proceedings before it, retaining jurisdiction for "such further action as may be required," and instructed the litigants to "promptly institute" a suit for declaratory judgment in the Texas state courts for resolution of the single issue of state law in question (Appendix B, p. 4B).

Reasons for Granting the Writ

1. *Direct conflict with decision of this Court in Meredith v. Winter Haven:*

The decision of the court below is directly in conflict with the decision of this Court in *Meredith v. Winter Haven*, 320 U.S. 228, 88 L.Ed. 9, 64 S.Ct. 7 (1943), and with subsequent Supreme Court decisions following that case.

The Court of Appeals in *Winter Haven*—again, as in the instant case, the Fifth Circuit—refused to render decision in a diversity case because it felt the applicable state law was confused and uncertain, and ordered dismissal of the cause without prejudice to the parties' right to proceed in the state courts to secure a determination of the state law involved. In what has long been recognized as a landmark in the area of "abstention", this Court reversed and ordered the Fifth Circuit to decide the case, stating definitively:

> "* * * the difficulties of ascertaining what the state courts may hereafter determine the state law to be do

not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.

> The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its nonexercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment * * * When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act." (320 U.S. at 234-35).

The *Winter Haven* decision and subsequent cases, such as *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 3 L.Ed. 2d 1163, 79 S.Ct. 1060 (1959), have recognized only two basic types of "exceptional circumstances" which will justify abstention: (i) the avoidance of a premature and perhaps unnecessary decision of a serious federal constitutional question, which might be mooted or put in a different posture by a state court determination of state law; and (ii) the avoidance of the hazard of unsettling some delicate balance in the area of federal-state relationships.

Neither of these factors is even professed, by the opinion below, to be present in the instant case; and, the cases are indeed "legion" where, absent these two exceptional circumstances, the federal courts have—contrary to the holding

of the Court of Appeals below—decided diversity cases by adjudicating issues of state law, even without relevant state court decisions and even though the questions were complex and difficult. See, e.g., *Propper v. Clark*, 337 U.S. 472, 93 L.Ed. 1480, 69 S.Ct. 1333 (1949); *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 93 L.Ed. 330, 69 S.Ct. 301 (1949). And see *Ford Motor Co. v. Mathis*, 322 F. 2d 267 (5th Cir. 1963).

2. *Direct conflict with recent decisions of other Courts of Appeals:*

In addition, the decision below directly conflicts with recent decisions by the Sixth Circuit and the Ninth Circuit which follow *Meredith v. Winter Haven*, and which hold that the mere difficulty of ascertaining what the state law is or may hereafter be determined by the state courts is not in itself a sufficient ground for "abstention" by a federal court in a diversity case. See *Keidan v. Universal C.I.T. Credit Corp.*, F. 2d (6th Cir. Feb. 13, 1964) (opinion not yet officially reported, but printed in full in Appendix in C, *infra* pp. 1C-5C); *Merritt-Chapman & Scott Corp. v. Frazier*, 289 F. 2d 849, 853-54 (9th Cir. 1961); cert. denied, 368 U.S. 835 (1961). In fact, this conflict is further compounded by the direct inconsistency of the en banc opinion below with a decision rendered only some five months earlier by a three-judge Fifth Circuit panel, in which the court held: "The fact that federal courts may have to interpret state law and that there is a lack of complete certainty as to state law on a particular issue are not in themselves sufficient reasons for a federal court to refuse to exercise its jurisdiction." *Akin v. Louisiana National Bank*, 322 F. 2d 749, 756 (5th Cir. Sept. 5, 1963).

3. *Decision below raises critical questions regarding federal jurisdiction, practice and procedure which are of fundamental importance far beyond the particular parties and facts involved:*

In view of the definitive opinion in *Meredith v. Winter Haven*—and the repeated and frequent application of the principles of that case, with continued refusal by federal courts to order abstention in diversity cases involving unsettled or complex questions of state law—it is surprising to see statements by commentators in legal periodicals,[2] by text writers,[3] and by courts[4] that the status of the abstention doctrine in diversity cases is unclear, that it is "not yet fully resolved" whether "abstention is appropriate in private litigation, merely because state law questions are involved in a case and their determination is difficult." Wright, *The Abstention Doctrine Reconsidered*, 37 Texas L. Rev. 813, 822-23 (1959).

Yet such uncertainty does exist as to the continued vitality of the *Winter Haven* boundaries of abstention in diversity cases—this confusion stemming directly from the decision of this Court in *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 3 L.Ed. 2d 1058, 79 S.Ct. 1070 (1959).

[2] Kaplan, *Certification of Questions from Federal Appellate Courts to the Florida Supreme Court and its Impact on the Abstention Doctrine*, 16 Miami L. Rev. 413, 421-23 (1962); Note, *Louisiana Power & Light v. Thibodaux: The Abstention Doctrine Expanded*, 69 Yale L.J. 643, 650-52, 654-55, (1960); Note, *Judicial Abstention from the Exercise of Federal Jurisdiction*, 59 Col. L. Rev. 749, 750, 763 (1959); Note, *Abstention by Federal Court from the Exercise of Jurisdiction in Diversity Case*, 13 Vand. L. Rev. 801, 803-04 (1960).

[3] 1 Barron & Holtzoff, Fed. Prac. and Proc. §64, pp. 348-50 (1960); cf. 1A Moore, Fed. Prac. §0.203[3], pp. 2119-21 (1959).

[4] See, e.g., *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820, 826 (9th Cir. 1963).

The result reached in *Thibodaux* was that abstention was approved in a diversity case which involved *both* a state eminent domain proceeding and a difficult and unsettled question of state law, seemingly on the theory that the second "exceptional circumstance" justifying abstention—"avoiding the hazards of serious disruption by federal courts of state government or needless friction between state and federal authorities"—was similarly present in state eminent domain proceedings, which are because of their special and peculiar nature "intimately involved with sovereign prerogative." (360 U.S. at 28).

However, the majority opinion in *Thibodaux* contains broad language emphasizing the wisdom of referring difficult and perplexing questions of state law to the state courts (360 U.S. at 26-27, 29). This language — especially when juxtaposed with the opinion rendered on the same day by this Court in *County of Allegheny v. Frank Mashuda Co.*, *supra*, which disapproves of abstention in a case involving a state eminent domain proceeding but clear and settled state law, reasoning that "Surely eminent domain is no more mystically involved with 'sovereign prerogative' than" a number of other matters as to which abstention has been refused (360 U.S. at 192) — has occasioned contentions that the emphasis in *Thibodaux* upon the special nature of state eminent domain proceedings was no more than a response to the objection that abstention was not proper in a case at law, rather than one in equity (360 U.S. at 28) * * * that in actuality *Meredith v. Winter Haven* was not distinguished on the basis that *Thibodaux* involved eminent

domain, but rather on the very technical procedural grounds (i) that *Winter Haven* involved an order *dismissing* federal jurisdiction rather than an order *staying* proceedings and retaining jurisdiction pending the state court determination as in *Thibodaux*, and (ii) that unlike the situation in *Thibodaux*, it was the Court of Appeals in *Winter Haven*, rather than the district court, which initially decided to refrain from adjudicating the state issues (360 U.S. 27, fn. 2; dissenting opinion — 360 U.S. at 38, fn. 4) * * * and that, therefore, the majority of this Court may well rule that abstention is proper in *any* diversity case involving a difficult or unsettled question of state law, and may accordingly either expressly overrule *Winter Haven* or, at the very least, continue to distinguish it on the very technical and very unsatisfactory procedural grounds mentioned above.

Indeed, this reasoning is perhaps afforded some support by the dissenting opinion of Mr. Justice Brennan in the *Thibodaux* case, which argued that the majority should frankly announce the overruling of *Meredith v. Winter Haven* since no adequate basis of distinguishing that case was presented (360 U.S. at 38), and which characterized the majority opinion as "the opening wedge for district Courts to refer hard cases of state law to state courts in even the routine diversity negligence and contract actions" (360 U.S. at 441).[8]

[8] See the legal periodical notes and articles listed in footnote 2, *supra*; cf. Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 448-89 (1960).

[8] It has been suggested that the confusion in this area is compounded "by the fact that Justice Brennan's dissenting opinion in the *City of Thibodaux* case, is in all respects similar to, and in many passages taken verbatim from, his opinion for the Court in the *Alleghany County* case." Wright, *The Abstention Doctrine Reconsidered*, 37 Texas L. Rev. 813, 821 (1959).

The validity of this concern, and the existence of the uncertainty and confusion as to the status of the abstention doctrine in diversity cases, are graphically illustrated by the opinion below, in which the majority—without even citing *Meredith v. Winter Haven*,[1] much less attempting to distinguish that case or to explain why it now feels that it may properly take precisely the same action ("abstention" after a decision on the merits by the trial court) which it took, and which the Supreme Court held was improper, some twenty years earlier in *Winter Haven*—has referred to the state courts for determination a "routine" diversity insurance case, which turns solely upon the meaning and applicability of a single opinion by the Texas Supreme Court.

This decision by the Court of Appeals is wrong: Meredith v. Winter Haven was not overruled, directly or indirectly, and its validity was not impugned, by *Louisiana Power & Light Co. v. Thibodaux*; the present case is indistinguishable from *Winter Haven*; and, the principles and rationale of *Winter Haven*—which are critical to the proper functioning of the federal judiciary—are most certainly correct.

(a) *Winter Haven not overruled or impugned.* The very careful efforts of the majority opinion in *Thibodaux* to limit the decision in that case—by emphasizing that certiorari was granted "because of the importance of the question in the judicial enforcement of the power of eminent domain under diversity jurisdiction" (360 U.S. at 26); by painstakingly stressing

[1] The majority opinion below contains no reference to the *Winter Haven* decision; the concurring opinion by Judge Brown simply notes without comment that "The dissent naturally stresses *Meredith v. City of Winter Haven*" (Appendix B, p. 6B, fn. 1).

the intimate involvement of eminent domain with state prerogative in order to fit the case into one of the two recognized situations for abstention (avoidance of needless friction with state policies) (360 U.S. at 28)—refute any assertion that *Winter Haven* was being questioned or overruled by indirection.[*] And, the principles of *Meredith v. Winter Haven* clearly are reflected in this analogous portion of the very recent opinion in *England v. Louisiana State Board of Medical Examiners*, U.S. , 11 L.Ed. 2d 440, 84 S. Ct. (Jan. 13, 1964), to wit:

> "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific heads of jurisdiction upon the federal courts, and with the principal that '*When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction * * * The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.*' Willcox v. Consolidated Gas Co., 212 US 19, 40, 53 L ed 382, 394, 29 S Ct 192, 48 LRA NS 1134.' (11 L.Ed. 2d at 444-45) (Emphasis added).

In addition, since the rendition of the *Thibodaux* opinion, *Winter Haven* has been cited with apparent approval in the majority opinion by Mr. Justice Frankfurter in *Clay v. Sun Ins. Office*, 363 U.S. 207, 212, 4 L.Ed. 2d 1170, 1176, 80 S. Ct. 1222 (1960), and with obvious approval by Mr. Justice

[*] Wright, *supra* note 6, at 823; 59 Col. L. Rev., *supra* note 2, at 763-65; 69 Yale L. J., *supra* note 2, at 650-52.

Douglas in his majority opinion for the Court in *McNeese v. Board of Education*, 373 U.S. 668, 10 L.Ed. 2d 622, 626 at fn. 5, 83 S. Ct. 1433 (June 3, 1963), and in his concurring opinion in the *England* decision (11 L.Ed. 2d at 451-52).

(b) *Winter Haven not distinguishable.* Just as in *Winter Haven*, it was the Court of Appeals in the present case, rather than the district court, which initially decided to refrain from adjudicating the issue of state law (360 U.S. at 27, fn. 2). Nor can any valid distinction be made on the ground that the Fifth Circuit "dismissed" the action in *Winter Haven*, while by the opinion below it "stayed" the proceedings and retained jurisdiction pending state court determination. Any attempt to dispose of *Winter Haven* by stressing the supposed difference between the "surrender" of jurisdiction by dismissal and the "retention" of jurisdiction technique must completely disregard the language and the rationale of *Meredith v. Winter Haven* and of subsequent decisions following that case.[9] Certainly, if this technical and procedural point had been of any significance, the Court in *Winter Haven* could have approved abstention and remanded with instructions that jurisdiction be retained pending state court determination, rather than order the Court of Appeals to adjudicate the issues as it did (360 U.S. at 38, fn. 4).[10] Moreover, obviously there is no difference whatever between a dismissal and a retention of jurisdiction

[9] See, e.g., the language of the Supreme Court cases cited on p. 7, supra.

[10] See, e.g., *NAACP v. Gallion*, 368 U.S. 16, 7 L.Ed. 2d 85, 82 S.Ct. 4 (1961) (lower court ordered to abstain until a particular date, then to proceed with adjudication if the state courts had not acted by that time).

in the present "routine" diversity insurance case, for once the state courts resolve the single issue involved—the meaning, effect and applicability of the Texas Supreme Court decision in *Continental Casualty Co. v. Warren, supra*—there simply would be nothing further for the Court of Appeals to do other than perfunctorily enter judgment in accordance with the state court determination; thus, unlike abstention in federal question cases where the federal court will (absent an *England* waiver) ultimately render decision on the federal issues, reasoning that abstention "does not constitute abnegation of judicial duty" but is only a "postponement of decision", collapses completely in situations like the present case (i.e., diversity cases involving *only* issues of state law).[11]

(c) *Principles underlying Winter Haven are of critical importance and must not be repudiated.* If the decision below is correct—if a federal court may abstain in a diversity case between private litigants merely because the state law is unclear or unsettled—then it can, contrary to the principles underlying *Meredith v. Winter Haven*, lead only to inefficiency in the functioning of the federal judiciary and to the victimization of parties who have a right to be before federal tribunals by confusion, by frustrating delay and by considerable added labor and expense.[12] Clearly, this is a matter which is critical to the proper administration of federal practice and procedure, and which is of fundamental

[11] 59 Col. L. Rev., *supra* note 2, at 763-65, fn. 102; 69 Yale L.J., *supra* note 2, at 653-54.

[12] Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Co-operative Judicial Federalism*, 111 U.Pa.L.Rev. 344, 346-48 (1963); 59 Col. L. Rev., *supra* note 2, at 778-79; Wright, *supra* note 6, at 826-27.

importance far beyond the particular parties and facts involved.

By abstention, two actions are created out of one; the litigants are subjected to substantial cost and delay in obtaining final adjudication of the controversy by a separate suit in the state court system. This considerable delay and expense may be magnified greatly if the propriety of abstention is contested in the federal appellate system prior to institution of the state court action. Indeed, especially in view of the uncertainty now surrounding the abstention doctrine, a party may feel compelled to test the correctness of abstention for fear of being shuffled back and forth between state and federal tribunals, *England v. Louisiana State Board of Medical Examiners*, *supra*, 11 L.Ed. 2d at 451 (concurring opinion)—or out of concern that the state court may, for one reason or another, refuse to render an "advisory opinion" or conclude that it is unable to do so.[13] See Note,

[13] For example, the Petitioner in the instant case was, in large part, motivated to file this Petition for Writ of Certiorari because of the distinct possibility that Texas Supreme Court—which would have obvious interests in the decision below—might itself refuse to render decision on the state issue, in the absence of some definitive ruling by this Court as to whether such abstention by the Court of Appeals in a diversity case involving "difficult" questions of state law was correct and whether the long-standing principles of *Meredith v. Winter Haven* are now to be discarded. Cf. *Elliott v. Joseph*, 163 Tex. 71, 351 S.W. 2d 879 (1961) (declaratory judgment may be withheld if an action at law is pending involving the same parties and issues).

Some 2½ years have already elapsed since the filing of this uncomplicated case; the prospects of still being without a decision on the merits, and of having to return belatedly to the federal courts, after sustaining the cost and delay of journeying through three separate tiers of courts in Texas are not attractive, to say the least. In addition, there is some danger that the Texas Supreme Court—because of state constitutional limitations upon its jurisdiction—might conclude that it would be unable to render such an "advisory opinion." Compare *Leiter Minerals, Inc. v. California Co.*, 241 La. 915, 132 So. 2d 845 (1961) with *Morrow v. Corbin*, 122 Tex. 553, 62 S.W. 2d 641 (1933).

Federal Proceedings Postponed Until State Court Determines Uncertain State Law; 40 Texas L. Rev. 1041 (1962).

Moreover, the extraordinary extension of the scope of the abstention doctrine (by the opinion below) most certainly will discourage future litigants from invoking federal diversity jurisdiction, *or even federal pendant jurisdiction*, because of the possibility that the federal district or appellate court might abstain and thus subject them to the expense and delay of separate journeys through two judicial systems. Indeed, as has been suggested, one or the other of the parties might deliberately select the federal courts for just this "forum-shopping" reason—i.e., with the conscious intent of attempting to prolong the litigation via abstention and a separate state court suit in order to force the opponent into settling or abandoning the case.[14]

Finally, the application of abstention in particular instances has been condemned as "prejudice against" and "disrespect for" diversity jurisdiction.[15] *This is, without doubt, true as to the decision below*; if even such "routine diversity negligence and contract actions", as the present case, are to be referred to the state courts merely because of the existence or supposed existence of a difficult or unsettled question of state law, then the diversity jurisdiction of the federal courts has been effectively emasculated by

[14] Kaplan, 16 Miami L. Rev., *supra* note 2, at 424-25; 69 Yale L. J., *supra* note 2 at 653-54, 656-57.

[15] *Clay v. Sun Ins. Office*, *supra*, 363 U.S. at 228 (dissenting opinion by Justice Douglas); *Louisiana Power & Light Co. v. Thibodaux*, *supra*, 360 U.S. at 41 (dissenting opinion by Justice Brennan).

judicial decree—for the complexity of "local law to federal judges is inherent in the federal court system as designed by Congress. Resolution of local law questions is implicit in diversity of citizenship jurisdiction."[16] *England v. State Board of Medical Examiners, supra*, 11 L.Ed. 2d at 451 (concurring opinion). The existence of the controversy over the desirability and utility of diversity jurisdiction must be conceded; yet—particularly in view of the repeated failures in Congress of the many and persistent attempts to eliminate or drastically curtail diversity jurisdiction[17]—it seems without question that, as stated in the dissenting opinion in *Thibodaux:*

> "* * * Until Congress speaks otherwise, the federal judiciary has no choice but conscientiously to render justice for litigants from different States entitled to have their controversies adjudicated in the federal courts. 'Whether it is a sound theory, whether diversity jurisdiction is necessary or desirable in order to avoid possible unfairness by state courts, state judges and juries, against outsiders, whether the federal courts ought to be relieved of the burden of diversity litigations,—these are matters which are not my concern as a judge. They are the concern of those whose business it is to legislate, not mine.' Burford v. Sun Oil Co. 319 US 315, 337, 87 L ed 1424, 1436, 63 S Ct 1098 (dissenting opinion) [by Justice Frankfurter]." (360 U.S. at 41-42).

These factors underlying the *Winter Haven* decision proscribing abstention in diversity cases which

[16] See 59 Col. L. Rev., *supra* note 2, at 778-79; *Propper v. Clark, supra*, 337 U.S. at 489-90.

[17] See 59 Col. L. Rev., *supra* note 2, at 778-79; Cardozo, *Choosing and Declaring State Law: Deference to State Courts Versus Federal Responsibility*, 55 Nw.L.Rev. 419 (1960).

involve only difficult or unsettled questions of state law—the resultant inefficiency in the administration of the federal judicial system; the confusion, waste, added expense and delay which would necessarily victimize litigants before federal courts; the radical enervation of diversity jurisdiction by judicial decree—far, far outweigh the basis of the decision below, as rationalized in Judge Brown's concurring opinion, that abstention is warranted merely because a federal declaration of state law, a declaration which will constitute an authoritative adjudication only of the law of the case between the parties to the litigation, may subsequently be overruled by the state courts. The decision of the Court of Appeals below manifestly "exacts a severe penalty from citizens for their attempt to exercise rights of access to the federal courts granted them by Congress to deny them 'that promptness of decision which in all judicial actions is one of the elements of justice.'" *County of Alleghany v. Frank Mashuda Co.*, *supra*, 360 U.S. at 196-97.

Conclusion: Accordingly, this Court should grant certiorari to resolve the conflict of decisions noted above, and to dispel the confusion concerning the scope of the abstention doctrine by reaffirming the principles of *Meredith v. Winter Haven* that abstention is not permissible in a diversity case between private litigants merely because complex or unresolved issues of state law are involved.

4. *Subsidiary questions:*

In the event that this Court were to reject the principles of or to overrule *Meredith v. Winter Haven*, then two subsidiary questions are presented by the statement of the question in this petition:

> (i) whether the Court of Appeals "rightly abstained," *sua sponte*, after the district court had rendered a decision on the merits;
>
> (ii) whether the Court of Appeals "rightly abstained" since the issue of state law involved was not, in fact, difficult or unsettled.[7]

These subsidiary questions, if reached, are also of fundamental and critical importance to federal jurisdiction and procedure since they pertain to limits which, of necessity, must be defined if abstention is to be allowed in diversity cases involving complex or unresolved state law issues, to wit: (i) the range of discretion of the district court in not abstaining and in rendering decision; see *England v. Louisiana State Board of Medical Examiners*, *supra*, 11 L.Ed. 2d at 453 (concurring opinion); Wright, *supra* note 6, at 825; and (ii) the scope of appellate review of the correctness of a lower court's conclusion that the state law is in fact difficult or unsettled; see Appendix B, p. 12B (concurring opinion); 69 Yale L.J., *supra* note 2, at 654-55.

---

[7] See, in this regard, the dissenting opinion by Judge Wisdom in the first —and now superseded—opinion of the Fifth Circuit in *United Services Life Ins. Co. v. Delaney*, 308 F.2d 484 (5th Cir. 1962). See also the briefs filed by the parties to this appeal before the Court of Appeals, certified copies of which have been filed with the Clerk of this Court.

Prayer

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM D. NEARY,
2300 Republic National
Bank Bldg.,
Dallas 1, Texas,
Attorney for Petitioner.

Of Counsel:

PINKNEY GRISSOM,
JERRY L. BUCHMEYER,
THOMPSON, KNIGHT,
WRIGHT & SIMMONS,
All of Dallas, Texas.

ORVILLE F. GRAHAME,
Worcester, Massachusetts.

Proof of Service

COUNTY OF DALLAS)
STATE OF TEXAS)

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared Jerry L. Buchmeyer, who being by me duly sworn upon oath stated: I, Jerry L. Buchmeyer, am not a member of the bar of Supreme Court of the United States; but I am a duly licensed and practicing attorney and a member of the State Bar of Texas and have been one of the attorneys of record for petitioner herein in all proceedings had in the courts below.

I further state upon oath that upon the 27th day of March, 1964, I served copies of the foregoing Petition for Writ of Certiorari on the Respondent, First National Bank in Dallas, Administrator of the Estate of Loy Thomas Brown, by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to the following counsel of record in the courts below, at their respective addresses, to, to-wit: Messrs. John W. Collins, Jr., 2128 Cloudcroft, Dallas, Texas, and Earl Luna, 1002 Dallas Federal Savings Building, Dallas, Texas, Attorneys for Respondent, First National Bank in Dallas.

Jerry L. Buchmeyer

SWORN TO AND SUBSCRIBED before me by the said Jerry L. Buchmeyer this the 27th day of March, 1964.

Notary Public in and for
Dallas County, Texas

APPENDIX A

(Statutes and Constitutional Provision)

28 U.S.C. §1332(a):

"The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;"

28 U.S.C. §1441(a):

"Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

U. S. Const. art. III, §2, cl. 1:

"The judicial Power shall extend to all Cases * * * between Citizens of different States * * *"

APPENDIX B

(Opinion and Judgment Below)

1. *Opinion Below*:

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19531

UNITED SERVICES LIFE INSURANCE COMPANY,
Appellant,

v.

JOAN FLORES DELANEY,
Appellee.

Appeal from the United States District Court for the Western District of Texas.

No. 19604

PAUL REVERE LIFE INSURANCE COMPANY,
Appellant,

v.

FIRST NATIONAL BANK IN DALLAS, Administrator of the ESTATE OF LOY THOMAS BROWN,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(February 4, 1964.)

Before TUTTLE, Chief Judge, and HUTCHESON, RIVES, CAMERON, JONES, BROWN, WISDOM, GEWIN and BELL, Circuit Judges

RIVES, CAMERON, JONES, BROWN and GEWIN, Circuit Judges: In the appeal of *United Services Life Insurance Company v. Delaney*, a panel of this Court, with one judge dissenting, rendered an opinion for the affirmance of a judgment of the district court holding the appellant liable on a policy of insurance on the life of Robert H. Delaney payable to the appellee, Joan Flores Delaney. *Delaney v. United Services Life Insurance* Co., D.C.W.D. Tex. 1961, 201 F. Supp. 25; *United Services Life Insurance Co. v. Delaney*, 5th Cir. 1962, 308 F. 2d 484. The insured was a lieutenant in the United States Army and met his death when an Army plane, of which he was the pilot and sole occupant, crashed. The insurer asserted a freedom from liability by reason of a policy provision[1] which limited its liability to premiums paid or the policy reserve if death resulted from aircraft travel except as a passenger on an aircraft owned and operated by the United States Government or as a passenger on a scheduled passenger air service. This Court, construing the insurance contract, held that under the governing law of Texas, the word "passenger" in the limiting clause of the policy had the same meaning as "occupant," and did not exclude the pilot. In reaching its decision, the Court felt it was impelled to the construction which it adopted by the pronouncements of the Texas

[1] "If this policy shall become a claim of death of the insured due to any service, training, travel, flight, ascent or descent in, on, or from any species of aircraft at any time, except death resulting from travel as a passenger on an aircraft owned and operated by the United States Government or as a passenger on a scheduled passenger air service regularly offered between specified airports, the liability of the company under this policy shall be limited to the premiums paid hereunder or to the then net reserve at time of death, if greater; any provision in this policy to the contrary notwithstanding * * *"

Courts in *Warren v. Continental Casualty Co.*, Tex. Civ. App. 1952, 248 S. W. 2d 315, and *Continental Casualty Co. v. Warren*, Tex. 1953, 254 S.W. 2d 762.

The appeal of *Paul Revere Life Insurance Company v. First National Bank* is from a judgment against the insurer on policies of accident insurance issued to the appellee's decedent, Loy Thomas Brown. The language of the policy pertinent here excludes coverage for "death or disability resulting from flight in aircraft except as a passenger on a civilian plane." The insured was killed while piloting, operating and in control of a private plane which crashed. The insurer asserted the exclusion clauses as a defense to an action on the policies. The district court, applying what it believed to be the law of Texas, and relying upon the *Warren* case, *supra*, as the source of the applicable law, rendered a summary judgment against the insurer, and in so doing held that the insured, at the time of his death, was a passenger on a civilian plane. A reconsideration by this Court of the meaning, effect and applicability of the *Warren* cases resulted in a grave doubt as to whether its rationale had been correctly determined in the *United Services* case. The *Paul Revere* case was submitted to the Court en banc. To avoid a conflict in our decisions the *United Services* case, then pending upon a motion for rehearing, was also referred to the Court en banc.

The two appeals are to be decided by the law of Texas, by which the insurance contracts are to be construed and from which the meaning of the contracts is to be determined. The guidance of the dim light of the Texas decisions leaves

the meaning of the questioned clauses obscure. Without further enlightenment any judgment we might pronounce would be "a forecast rather than a determination." *Railroad Commission v. Pullman Company*, 312 U. S. 496, 499, 61 S. Ct. 643, 85 L. Ed. 971. The Supreme Court has "increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law." *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U. S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058, reh. den. 360 U. S. 940, 79 S. Ct. 1442, 3 L. Ed. 2d 1552. It is appropriate that this Court stay its hand until the courts of the State of Texas shall have declared the law of the State of Texas which is applicable to and controlling in the disposition of these appeals. Each of the appellants can, and should, promptly initiate a proceeding in a Texas court seeking a declaratory judgment for the determining of the meaning of the pertinent clauses of the respective insurance contracts, with a review of such judgment by a court of last resort of the State of Texas.

An order will be entered in each of the appeals staying further proceedings in this Court until the courts of Texas shall have been afforded an opportunity to determine the issues to be submitted. This Court will retain jurisdiction for the purpose of taking such further action as may be required.

TUTTLE, Chief Judge, and HUTCHESON, WISDOM and BELL, Circuit Judges, dissenting:

We respectfully dissent. The mandate from Congress that we decide diversity cases, Title 28 USCA, § 1332; *Meredith*

v. City of Winter Haven, 1943, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9, makes plain our duty to decide these matters.

They are not the exceptional cases referred to in *Meredith v. City of Winter Haven, supra*, where a federal court may decline to act, nor do they fall in one of the classes of cases where the doctrine of abstention has been given application. *Thompson v. Magnolia Petroleum Co.*, 1940, 309 U.S. 478, 60 S.Ct. 628, 84 L.Ed. 876; *Railroad Commission of Texas v. Pullman Co.*, 1941, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971; *Burford v. Sun Oil Co.*, 1943, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1423; and *Louisiana Power & Light Co. v. City of Thibodaux*, 1959, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058. And Texas, unlike Florida, has made no provision for the certification by federal courts of doubtful questions to its Supreme Court for resolution. *Clay v. Sun Insurance Office, Ltd.*, 1960, 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed.2d 1170, on certification, 133 So.2d 735; *Aldrich v. Aldrich*, No. 55, U.S. Supreme Court, Oct. Term, 1963, decided November 12, 1963, 32 Law Week 4006; and *Grech v. American Tobacco Company*, 5 Cir., 1962, 304 F.2d 70, on certification, 154 So.2d 769. See generally 1 Barron & Holtzoff (Wright Ed.), § 64; Wright, Federal Courts (1963 Ed.), § 52; and 1 A Moore's Federal Practice, pp. 2101-2124 and 3331-3332.

Being of this view, we would proceed to disposition on the merits; hence, this dissent.

BROWN, Circuit Judge, concurring:

I join in the Court's decision to abstain pending determination of the controlling question of state law by the Courts

of Texas. Prompted in part by matters briefly stated but strongly stressed in the dissenting opinion, but also by the nature of our action in postponing decision of what appears on the surface to be a simple case of contract construction, I think it appropriate to make these additional comments.

Abstention in a diversity case is no more an abdication[1] of the constitutional-statutory duty to decide[2] than its abstention in the field of determination of federal questions[3] in which the Federal Courts have a "primacy." *England v. Louisiana State Board of Medical Examiners*, 1964, U.S. , S. Ct. , L.Ed.2d , 32 U.S.L. Week 4093, 4094 [U.S. January 13, 1964].

Abstention is neither abandonment of *duty*, on the one hand, nor a problem of raw *power*, on the other. It is judge-fashioned and being such, the cloth should be cut to the pattern.

The doctrine is, of course, a means devised to ameliorate some of the problems inevitably growing out of our unique federalism. For federal question cases, unseemly or unnecessary collision with a state is to be avoided, or at least postponed until such time as it is inescapable. Although the adjustment between the National Courts and a State takes a different turn in diversity cases, the underlying problem is essentially the same. And the impact—on local litigants and jurisprudence—is equally, if not more, awesome. This concern is, for example, reflected by the "outcome determi-

[1] The dissent naturally stresses Meredith v. City of Winterhaven [sic], 1943, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed 9.

[2] U.S. Const. art. III; 28 USCA §1332.

[3] 28 USCA §§1331, 1336, 1441(b), 1343; 42 USCA §§1981-86.

native" test[4] likewise judge-fashioned to meet the needs of *Erie*, only few of which had emerged when *Meredith* (note 1, *supra*) was announced in 1943. This approach recognizes that it is basically unfair for decision to turn on irrelevant accidents such as state citizenship, residence, geography, or the case being filed in one courthouse, rather than in the one a block down the street.

If in like cases diverse results are unfair when precipitated by quasi procedural rules, such as service of process, statute of limitations, etc., how much more unfair is it when the diverse result flows from diverse holdings on substantive law. This is a factor of growing importance as our own recent experience graphically demonstrates. Though our decisions survive the discretionary review of certiorari, most of the time because they are really not "certworthy," Harlan, J. in *Tipton v. Socony Mobil Oil Co.*, 1963, U.S. , 84 S.Ct. , 11 L.Ed. 2d 4 (dissenting opinion), many of them do not fare so well when they are tested in the place that really counts—the highest, or first-writing court, of the State concerned. See *Ford Motor Co. v. Mathis*, 5 Cir., 1963, 322 F.2d 267. Within the very recent past, both Texas[5] and Alabama[6] have overruled decisions of this

[4] Guaranty Trust Co. v. York, 1945, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079; Byrd v. Blue Ridge Elec. Coop., 1958, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953; and see Monarch Ins. Co. v. Spach, 5 Cir., 1960, 281 F.2d 401, for an extensive discussion of the whole problem area. See also Smith, Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation, 36 Tul. L. Rev. 443 (1962).

[5] Truck Ins. Exchange v. Seelbach, 1960, 161 Tex. 250, 339 S.W.2d 521, expressly rejecting National Surety Corp. v. Bellah, 5 Cir., 1957, 245 F.2d 936.

[6] The Supreme Court of Alabama in New York Times Co. v. Sullivan, 1962, 144 So.2d 25, 51, categorically rejected the views previously expressed by us in New York Times Co. v. Conner, 5 Cir., 1961, 291 F.2d 492, on the so-called single publication rule. Thereafter we bowed the knee, 5 Cir., 1962, 310 F.2d 133. Following grant of certiorari, 371 U.S. 946, 83 S.Ct. 510, 9 L.Ed.2d 496, this case was argued January 14, 1964, 32 U.S.L.Week 3249.

Court, and the score in Florida cases is little short of staggering. In similar, but subsequent, cases, the Florida Courts have expressly repudiated our holdings in a number of cases.[7] And now that we have this remarkable facility of certification, we have not yet "guessed right" on a single case.[8] And within the month we have had to reach back over 2 years to grant a belated second petition for rehearing to completely undo our decision in *Maryland Casualty Co. v. Hallatt*, 5 Cir., 1961, 295 F.2d 64, because of an intervening, authoritative express disapproval of it by the Florida Courts[9] nothwithstanding the fact that on remand a second trial had been had which resulted in victory for the insurance company. He who had lost now won, and he who had won now lost, *Maryland Casualty Co. v. Hallatt*, 5 Cir., 1964, F.2d , [Nos. 18485 and 20197, January 10, 1964].

Of course no one in his right mind is unrealistic enough to suppose that the law is always a perfect symmetry, never

[7] See, e.g., Food Fair Stores, Inc. v. Trussell, Fla.Sup.Ct., 1961, 131 So.2d 730, expressly disapproving Pogue v. Great Atlantic & Pacific Tea Co., 5 Cir., 1957, 242 F.2d 575.

[8] After remand by the Supreme Court directing certification, Clay v. Sun Ins. Office, 1960, 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed.2d 1170, the Supreme Court of Florida, 1961, 133 So.2d 735, disagreed with our earlier expression of local law in our initial opinion, 5 Cir., 1959, 265 F.2d 522. This was followed by our second opinion, 5 Cir., 1963, 319 F.2d 505, now pending after certiorari granted, 1963, U.S. , S.Ct. , 11 L.Ed.2d 262.

Most spectacular is, of course, the cigarette warranty case of Green v. American Tobacco Co., 5 Cir., 1962, 304 F.2d 70, by a divided Court. The Supreme Court of Florida thereafter essentially sustained the dissenting opinion of Judge Cameron, 1963, 154 So. 2d 169. As in *Clay*, we have perhaps added some more complications to the case on resubmission following the answers from the Florida Supreme Court, 5 Cir., 1963, F.2d [No. 19003, December 11, 1963].

[9] Barnes v. Threshermen and Farmers Mutual Casualty Co., Fla.Ct.App., 1963, 146 So.2d 119, cert. denied, 153 So.2d 705. As in *Green*, the dissent (Rives, J.) was the law.

involves contradictions, always avoids conflicts. But these cases illustrate what is happening nearly every day; even though the rejection of *Erie*-federally declared state law may not be quite so spectacular as it has been in these specific cases.

In many ways the desirability of "abstaining" in diversity cases is more pressing than in federal question cases. In a federal question case—barring the now unlikely possibility, after *England v. Louisiana State Board of Medical Examiners*, 1964, U.S. , S. Ct. , L.Ed.2d [32 U.S.L. Week 4093 (U.S. January 13, 1964)], that anyone will ever voluntarily commit determination of the federal question to the state court—the case ultimately comes back to the federal court for the decision on the federal question. To test the correctness of the decision on the federal question, there is an appeal as a matter of right to the Court of Appeals for a single Judge case[10] and to the Supreme Court in three-judge cases.[11] If in error, the wrong can be corrected as to those parties and in that case. But not so for diversity. As a Court of Appeals, our decision in a diversity case is for all practical purposes final and irretrievable as to those parties and that cause of action. The Supreme Court, within its physical capacity, cannot entertain any such cases as to the merits of the state question. When such cases get there, it is almost always because of some federally assured procedural right, such as the Seventh Amendment, Federal

[10] 28 USCA §1291; F.R.Civ.P. 73.

[11] 28 USCA §1253. This is so even though the Supreme Court administratively handles much of this by motion to dismiss or affirm, see Supreme Court Rules 16(1)(a)(b) and 16(1)(c).

Rules of Civil Procedure on discovery, or the like. The law announced by us becomes the law of the Medes and Persians which altereth not until the state authoritatively declares the law to be otherwise. When the subsequent state declaration is made, our former opinion evaporates as though it never existed. "The Moving Finger writes, and having writ, moves on. But it may be that having written, what we write is soon erased." *Ford Motor Co. v. Mathis*, 5 Cir., 1963, 322 F.2d 267. But in the meantime, the litigants in the federal diversity case have suffered a loss of rights, or have been subject to burdens which the local law does not support. Thus it is that the only person who is hurt is the one who has no effective recourse to correct the error. *Cf. Tipton v. Socony Mobil Oil Co.*, 5 Cir., 1963, 315 F. 2d 660, 662, 667, 1963 AMC 1800, 1803, 1809 (dissenting opinion), reversed per curiam, 1963, U.S. , S.Ct. , 11 L.Ed. 2d 4.

All of these consequences can be avoided in a diversity case by devising a suitable method by which to obtain an authoritive state ruling on the controlling question of state law. That leaves, of course, the problem of just *when* resort should be had to the method devised—when, in short, to "abstain" either on the trial or appellate level. But the fact that such a subsidiary question is not always an easy one should not (a) detract from proper use of the method devised, or (b) make superfluous the task of determining whether the case is a proper one for its use. That is the essence of adjudication. That is why judicial travail is worthwhile.

Obviously the problem of abstention is not one of *power*. This much is manifest from its extensive use in federal question cases as to which the Federal Court has the last and only say (short, of course, of an *England* abandonment). Since it is not a question of *power*, the exercise of abstention cannot depend on the existence of a state procedure or a precise, unusually effective state remedy. If one is not readily available, then one must either be devised within permissible limits, or the parties must be left to their own resourceful imaginative devices.[12] The fact that Florida has provided an unusually effective method in its certification procedure and that in *Clay*, *Aldrich* and *Dresner*,[13] the Supreme Court, as we have in *Green*[14] has directed that the question be certified does not establish the proposition that it is the Florida State procedure which invests the Federal Court with the power to certify. It would be strange indeed if the matter of *power* of a con-

[12] As Justice Douglas points out in note 8 of his concurrence in *England*, a way was found in Meredian *v.* Southern Bell T. & T. Co., 1959, 358 U.S. 639, 79 S.Ct. 455, 3 L.Ed.2d 562, despite the absence of a declaratory judgment procedure in Mississippi. The parties simply switched roles. He who was pursued became the pursuer. Southern Bell T. & T. Co. v. Meridian, 1961, 241 Miss. 678, 131 So.2d 666. Even the National Sovereign may be sent to the State Courts to determine state questions such as ownership of minerals. Leiter Minerals, Inc. v. United States, 1957, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267, modifying and affirming, 5 Cir., 1955, 224 F.2d 381, affirming E.D.La., 1954, 127 F.Supp. 439. See the case on remand, Leiter Minerals, Inc. v. California Co., La.Ct.App., 1961, 126 So.2d 76, reversed, 241 La. 915, 132 So.2d 845.

[13] Clay v. Sun Insurance Office, 1960, 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed.2d 1170; Aldrich v. Aldrich, 1963, ___ U.S. ___, 84 S.Ct. ___, 11 L.Ed.2d 304, certifying questions in conformity with prior Memorandum Decision, 375 U.S. 75, 84 S.Ct. 184, 11 L.Ed.2d 141; Dresner v. Tallahassee, 1963, ___ U.S. ___, 84 S.Ct. ___, 11 L.Ed.2d 208.

[14] Green v. American Tobacco Co., 5 Cir., 1962, 304 F.2d 70.

At this very moment, in the pending petition for rehearing, this Court on its own motion has directed the parties to brief the question of desirability of certification and the form of proposed question for certification to the Florida Supreme Court in Vandercook and Son, Inc. v. Thorpe, 5 Cir., 1963, 322 F.2d 638.

stitutionally created Article III Court could depend on the presence or absence of state legislation or state procedure. If the Federal Court can "abstain," that is, defer decision by sending parties to a particular state procedure for authoritative decision by the state tribunals of issues committed finally to the state, it may do so only because that course is appropriate to the exercise of federal judicial authority, not because a state has supplied a handy scheme or tool.

One other aspect bears directly on the problem of *when*, or under *what* circumstance, a suitable state procedure is to be employed. Again, it is equally obvious that the matter of *power* does not turn on the complexity or simplicity of the state issue. The exercise of the power may well suggest evaluation in such terms, lest each and every diversity case on its initial filing be immediately turned out to graze in the state pasture. But in that process, whether the state issue is "difficult" or "complicated" or "simple" cannot be determined by any superficial inquiry or surface appearance. Thus it is here. We have what appears to be two Texas insurance contracts, each with its own exculpatory clause, being measured perhaps against what the Texas Courts have said, or said they have said, concerning comparable contracts.[15] But a closer study shows that

[15] The eyes of all are focused on Warren v. Continental Casualty Co., Tex.Civ.App., 1952, 248 S.W.2d 315, and Continental Casualty Co. v. Warren, Sup.Ct.Tex., 1953, 152 Tex. 464, 254 S.W.2d 762. In the course of our effort to resolve the substantive question, we learned that the *Warren* decision had been examined by the Texas Court at least seven times. Two of these cases were urged as particularly significant: Great American Indemnity Co. v. Myrle Pepper et al., Tex.Civ.App., 1960, 334 S.W.2d 333; Clark v. Lone Star Life Insurance Co., Tex.Civ.App., 1961, 347 S.W.2d 200.

our real difficulty is not in the work of legal journeymen divining the "intention" of the parties in a run-of-the-mill contract interpretation case. Rather, it centers around the Texas law governing the interpretation and construction of insurance contracts. Nowhere is this more manifest than in our inability to decide just what the Texas law is on either one of these aspects. It was complicated not only by the necessity of construing its meaning in one case, but in determining in what way or to what extent such decision would, or would not, alter or control the other case.[16] The decision of one case might be fairly simple, but the decision of two or more cases gives rise to extremely difficult problems of stare decisis, a problem which we have recognized to be so important to a multi-judge court sitting in panels of three.[17]

When nine Judges, five of whom heard extended arguments in each of the cases on submission to separate panels, followed by extended briefs on submission en banc, state they cannot agree on what the controlling law is, I do not think the case can any longer be described as "easy," or "simple."

What should we do under such circumstance? Should we make a guess? Should we make a guess in one of the two cases, leaving the other to the chance of possible distinction to save it from stare decisis? And would not

[16] The two instant cases are not the only ones. Pending and argued before another panel of this Court is another Texas "pilot passenger" insurance case. Decision has been deferred pending our efforts to determine and pronounce controlling Texas legal principles.

[17] We recognized this as a substantial problem in the administration of justice in Lincoln Nat'l Life Ins. Co. v. Booth, 5 Cir., en banc, 1962, 306 F.2d 110.

this add to the general confusion if the panel in the other or the subsequent case declines to be bound by an en banc decision brought about on the Court's own motion from the declared apprehension that an earlier decision was at least doubtful enough as to warrant a review by the full Court?[18] If we "guess it off" for Texas, what happens to equality of treatment within the six States of this Circuit when, for like questions, either initially or under Supreme Court mandate, we certify to the Florida Supreme Court?

It is judicial statesmanship of the highest and proper order for us to conclude that these questions, so very vital and important to these contesting litigants, should be decided by courts who either know the answer or who can write it if it has not yet been announced. Texas has a judicial system which will permit adjudication with dispatch and speed. And its excellent Judges and Courts have a full

[18] The Clerk's letter-order February 14, 1963, to counsel in the two instant cases stated:

> "By a majority vote of the active members of the Court, the Court will consider the appeal in the above first entitled case [*Revere*, No. 19604] en banc. This results from a determination on the part of the Court to give further consideration to the opinion heretofore filed in the second above entitled case [*Delaney*, No. 19531], as to which a motion for rehearing has been denied.
>
> "The case will be submitted without argument after all parties at interest have had further opportunity to file briefs in the matter. In view of the fact that the mandate of this Court has not gone down in the United Services Life Insurance Company case, counsel in that case are also invited to file a memorandum with the Court dealing with the question as to what procedure should be followed by the Court to make certain that it is not finally disposed of until after the Court has made its decision in the Paul Revere Life Insurance Company case. The appellants in both of these cases may file such additional briefs as they are advised on or before March 1, 1963, and respondents in both cases may then file such additional briefs as they may be advised on or before the 1st day of April."

arsenal of procedural devices which will enable the parties to have a prompt and completely sufficient determination."

" Texas has long had express provision for declaratory judgments. Tex. Civ.Stat.Ann. art. 2524-1. As the problem is likely one of determination without evidence, or if evidence is needed, it, too, will turn out to be substantially uncontradicted, decision will undoubtedly be expedited through the use of summary judgment, now frequently employed by Texas Courts. Tex.R.Civ.P. 166-A; Gaines v. Hamman, 1962, Tex. , 358 S.W.2d 557; Hester v. Weaver, Tex.Civ.App., 1952, 252 S.W.2d 214, error ref'd.

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La.

2. *Judgment Below:*

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19604

PAUL REVERE LIFE INSURANCE COMPANY,
Appellant,

v.

FIRST NATIONAL BANK IN DALLAS, Administrator of the ESTATE OF LOY THOMAS BROWN,
Appellee.

Appeal from the United States District Court for the Northern District of Texas

---

Before TUTTLE, Chief Judge, and HUTCHESON, RIVES, CAMERON, JONES, BROWN, WISDOM, GEWIN, and BELL, Circuit Judges.

Pursuant to the opinion this day rendered it is hereby

ORDERED That further proceedings herein in this Court shall be and hereby are stayed until the courts of the State of Texas shall have been afforded an opportunity to determine the issues to be submitted to such courts as set forth in said opinion; retaining jurisdiction to take such further action as may be required.

TUTTLE, Chief Judge, and HUTCHESON, WISDOM and BELL, Circuit Judges, dissenting.

APPENDIX C

(Unreported Conflicting Opinion)

No. 15349

In the

United States Court of Appeals

FOR THE SIXTH CIRCUIT

In the Matter of JAMES MOHAMMED, d b a
Nick's Auto Sales & Service,
Bankrupt.

HERBERT S. KEIDAN, Trustee,
Petitioner-Appellee,

v.

UNIVERSAL C.I.T. CREDIT CORPORATION,
Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided February 13, 1964.

Before: O'SULLIVAN and PHILLIPS, Circuit Judges, and MAGRUDER, Senior Circuit Judge.

MAGRUDER, Circuit Judge. The sole question which we have in this case involves the interpretation of a Michigan statute, as it would presumably be interpreted by the Michigan Supreme Court. Unfortunately we cannot turn to any decision of that court on the point. The nearest case

is an early one, *Montgomery v. Wight*, 8 Mich. 143 (1860); but there the chattel mortgage was originally executed in Canada. Also, the Michigan statute was different.

Preliminarily, appellant in an additional brief says that a federal court should not pass upon this question but rather should leave it to be decided by the state courts, which alone may give an authoritative ruling. It cites two Supreme Court opinions, *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940), and *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). We think, however, that this is a case like *Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943), where the mere difficulty of ascertaining what the state courts may hereafter determine the state law to be is not in itself a sufficient ground for a federal court "to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision." In the present situation there is no exceptional circumstance which would indicate a different conclusion.

This brings us to the facts herein. A referee in bankruptcy has held that a chattel mortgage on an automobile which was assigned by the mortgagor to the appellant was invalid under the laws of Michigan, and has ordered the turning over of the automobile to the trustee in bankruptcy, who was permitted to sell the automobile free and clear of said mortgage lien. Upon reviewing the order of the referee, the court below affirmed it.

We believe that the district court committed error in its interpretation of the Michigan statute.

At the time of the execution of the mortgage, the bankrupt lived in Macomb County. Subsequently he moved to Wayne County and took the mortgaged car there. The creditor had knowledge of these events. A copy of the mortgage was not recorded in Wayne County. It was admitted by appellee that the mortgage was originally timely recorded in Macomb County and that the mortgage therefore was initially valid. The holding was that the failure to record the mortgage in Wayne County had invalidated it as against the trustee in bankruptcy. This is the holding that we regard as error.

The district court relied upon the provision of Act No. 233 of the Public Acts of 1957 (Mich. Stat. Ann. § 26.929 [1958], reading in part as follows:

> "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, *shall* be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or true copy thereof *shall* be filed in the office of the register of deeds of the county where the goods or chattels are located, and also where the mortgagor resides. * * * Provided, however, That no purchase money mortgage shall be void as against the creditors of the mortgagor if filed within 14 days from the date of the execution of such mortgage. * * *
>
> "Copies of any such mortgage or conveyance intended to operate as a mortgage and of the affidavit thereto attached *may*, *with like effect*, be filed in the office of the register of deeds of the county to which such goods or chattels or any portion thereof may thereafter be removed. This provision *shall* not be con-

strued as altering or affecting the foregoing requirements as to the office or offices in which such mortgage or copy thereof *shall* be filed.

* * *

"* * * An assignment in writing of any such mortgage *may* be filed in the office wherein the mortgage so assigned is filed.

"Every register of deeds *shall* accept and file in his office in the manner required by this act, every mortgage or copy thereof to which is attached the affidavit or copy thereof herein required, and every renewal affidavit, assignment, or discharge of any mortgage, which may be tendered to him for filing by any person, accompanied by the fee herein required.

"Each register of deeds *shall* so file, keep and preserve every mortgage or copy thereof and any instrument filed in connection therewith, either by means of numbers or other distinguishing marks, that the same shall be made easily available by reference to the index kept by him in accordance with the provisions of section 12 of this chapter, for examination by any person." (Emphasis supplied).

The court conceded that ordinarily the word "may" is permissive merely and "does not carry with it any mandatory effect." At the same time it considered that the words "with like effect" following "may" cast the language in an ambiguity and justified the court in looking to the general "purpose" of the legislation.

It is true that in *Smith v. City Commission*, 281 Mich. 235, 274 N.W. 776 (1937), it was held that the word "may" in a proper case could be given a mandatory effect.

But we do not perceive the ambiguity. It seems to us, as stated in appellant's brief, that all the provision means

is that when the county of location of the mortgaged chattel and the county of residence are the same, there is only one office in which to file; where they do not coincide, there are two offices in which to file. The Michigan legislature knew the difference between "shall" and "may," since both expressions appear in close juxtaposition in the same statute. The word "may" should be given its ordinary meaning. Thus the act as a whole is to be construed and every part of it given an appropriate meaning, which is the test in *Smith v. City Commission*, supra.

The referee regarded it as significant that, as freely confessed by the appellant, the mortgagee knew of the removal of the chattel to Wayne County, and he concluded that "the failure by the [appellant] to record its mortgage in Wayne County after it had knowledge the Oldsmobile automobile was removed to that County invalidates its mortgage." This is an additional reason why the word "may" should be given its normal meaning: to make the invalidation depend upon the receipt of this knowledge by the mortgagee only shows that the statute has been rewritten and not simply interpreted.

The subject is of diminished importance in view of the fact that under the Uniform Commercial Code, which has been adopted in Michigan, clearly the mortgage would be valid. Act No. 174, Public Acts of 1962 (Mich. Stat. Ann. § 19.9401(3)).

A judgment will be entered reversing the order of the District Court and remanding the case to that court for further proceedings consistent with this opinion.